

1 Elizabeth Ortiz, Bar No. 012838
2 Executive Director
3 Arizona Prosecuting Attorneys'
4 Advisory Council
5 1951 West Camelback Road, Suite 202
6 Phoenix, AZ 85015-3407
7 (602) 542-7222 / FAX (602) 274-4215
8 Elizabeth.Ortiz@apaacaz.com

9
10 **IN THE SUPREME COURT**
11 **STATE OF ARIZONA**
12

13 In the Matter of:

Supreme Court No. R-18-0001

14 **PETITION TO AMEND THE**
15 **ARIZONA RULES OF CRIMINAL**
16 **PROCEDURE**

17 **COMMENT OF THE ARIZONA**
18 **PROSECUTING ATTORNEYS'**
19 **ADVISORY COUNCIL**

20 **I. BACKGROUND OF PETITION**

21 The Arizona Voice for Crime Victims has petitioned the Supreme Court to
22 amend the Arizona Rules of Criminal Procedure by integrating existing victims'
23 rights provisions in the Arizona Constitution and its implementing legislation
24 throughout each applicable criminal rule. In conjunction with this integration, the
25 petition proposes the repeal of existing Rule 39 ("Victims' Rights"). The Arizona
Prosecuting Attorneys' Advisory Council ("APAAC") has considered the proposed
changes in the petition and generally supports them, with some caveats outlined
herein. Notably, while APAAC agrees that integrating victims' rights into the
various criminal rules can have a meaningful impact on protecting and improving

1 rights of crime victims, Council members express caution over the full repeal of Rule
2 39. The suggestions and observations in this Comment are intended to enhance and
3 strengthen the proposed changes as set forth in the petition.
4

5 **II. DISCUSSION/ANALYSIS**

6 Rule 39 was promulgated by the Arizona Supreme Court on July 24, 1989 and
7 became effective August 1, 1989. A year later, Arizona voters approved Prop 104,
8 which amended the Arizona Constitution, effective November 16, 1990, to add a
9 Victims' Bill of Rights ("VBR"). Ariz. Const. art. 2, § 2.1. A year after that, the
10 state Legislature passed, effective December 31, 1991, the Victims' Rights
11 Implementation Act ("VRIA"). Ch. 229, 1991 Ariz. Sess. Laws 1137, codified as
12 A.R.S. §§ 13-4401 *et seq.* The Legislature enacted the VRIA to "define, implement,
13 preserve and protect the rights guaranteed to crime victims by [Ariz. Const. art. 2, §
14 2.1]." Historical and Statutory Notes to A.R.S., tit. 13, ch. 40 (Supp.1994).
15
16
17

18 **A. Applicability to Victims Who Have Invoked Rights**

19 In recommending the total repeal of Rule 39 Victims' Rights, petitioner has
20 taken those provisions of Rule 39 that are otherwise specifically covered in the VBR
21 and VRIA and has eliminated them. One positive effect of this is to remove
22 redundancies existing in the language among the VBR, VRIA and Rule 39. Of
23 concern, however, is that the proposed revisions to the criminal rules do not clearly
24 differentiate those victims who have invoked their rights from those who have not.
25

1 Current Rule 39(e) (“Victim’s Duties”) provides for how a victim must claim the
2 notification rights and privileges provided in the criminal rule(s). Current Rule 39(g)
3 requires the court to inquire if the victim has requested notice, has been notified, and
4 is present. Those provisions were not rewritten into the petition’s proposed criminal
5 rule change language, so most references to the ‘victim’ are without clarity as to
6 whether that victim has invoked the rights and privileges afforded to them.
7

8
9 By not clarifying their proposed changes to apply to only victims who have
10 invoked their rights, the proposed language changes could result in significant
11 procedural delays while attempts are made to obtain victim input. For instance,
12 obligations are created in the proposal for the court to “consider[] the views of the
13 victim” (see, *e.g.*, proposed Rules 8.2, 16.3, 16.4, 27.7) without regard to whether
14 those victims have requested notice. Although A.R.S. § 13-4417.A requires a victim
15 to request notice on an agency form, there is no corresponding requirement in the
16 VRIA for the court to inquire of the State or otherwise determine whether the victim
17 has requested notice. Rule 39(g). See section C.7, *infra*.
18

19
20 APAAC recommends that the petition clarify that the proposed revisions to
21 the criminal rules apply only to those victims who have invoked the notification
22 rights and privileges of the VBR and FRIA. This would remove any ambiguity as
23 to the applicability of the proposed rule changes. In addition, in its review of the
24

25 . . .

1 proposed rule changes in this petition, APAAC has identified certain other areas for
2 suggested clarification in the integration of victims' rights into the rules.

3
4 **B. Suggested Integration Clarifications**

5 **1. Rules 1.3 (Computation of time.) and 1.9 (Motions, oral argument,
6 and proposed orders.)**

7 Rule 1.3(a)(5) computes certain time limitations for when a party may or must
8 act. The petition proposes adding "*or crime victim*" as an actor under the rule.
9 Similarly, Rule 1.9 requires a moving party to serve motions and proposed orders on
10 all parties and allows a party to request oral argument. The petition proposes adding
11 "*or the victim's attorney*" as a party who may file and serve motions and request oral
12 argument. APAAC suggests a clarification.

13
14 Arizona caselaw is clear that crime victims are not "parties." *Lindsay R. v.*
15 *Cohen*, 236 Ariz. 565, ¶ 8, 343 P.3d 435, 437 (App. 2015) ("The VBR does not make
16 victims 'parties' to the prosecution[.]"); *Lynn v. Reinstein*, 205 Ariz. 186, ¶ 15, 68
17 P.3d 412, 417 (2003) ("[n]o statute or rule confers party status upon a victim[.]").
18 However, A.R.S. § 13-4437.A provides that a victim has "standing to seek an order,
19 to bring a special action or to file a notice of appearance in an appellate proceeding"
20 in order to enforce a right or challenge a denial of a right. The victim also has the
21 right to be represented by counsel in asserting any right. This standing was
22 addressed in *State ex rel. Montgomery v. Padilla*, 238 Ariz. 560, 364 P.3d 479 (App.
23
24
25

1 2015), where the court considered a victim's ability to assert their statutory rights
2 through objection:

3
4 Standing to seek an order implies the right to properly request an order.
5 With exceptions not applicable here, a request for an order in a criminal
6 case must be timely, in writing, served and filed with the court. *See*
7 *Ariz. R. Crim. P. 35.3*. For victims, the subject matter of such a request
8 is limited and must be directed to "enforc[ing] any right or to
9 challeng[ing] an order denying any right guaranteed to victims." A.R.S.
10 § 13-4437.A.

11 238 Ariz. at ¶ 22, 364 P.3d at 485. Given the limitation expressed in *Padilla* and the
12 existing caselaw, APAAC recommends that the proposed changes to Rules 1.3 and
13 1.9 be clarified to apply to those provisions as outlined in A.R.S. § 13-4437.A.

14
15 **2. Rule 6.7 (Appointment of investigators and expert witnesses for**
16 **indigent defendants.)**

17 Rule 6.7(d) requires a defendant in a capital case to move for an expert or
18 mitigation specialist no later than 60 days after the State's 15.1(i)(3) disclosure. The
19 petition proposes reducing that time from 60 to "30" days. APAAC notes that this
20 is a substantive change beyond integrating existing victims' rights into the various
21 criminal rules.

22 **3. Rule 9.3 (Exclusion of witnesses and spectators.)**

23 Rule 9.3(b)(1) provides that regarding spectators, court proceedings are open
24 to the public unless the court finds a clear and present danger to the defendant's right
25 to a fair trial by an impartial jury. The petition adds to this provision by including a

1 court finding of clear and present danger “to the victim’s rights to be treated with
2 fairness, respect, and dignity, and to be free from intimidation, harassment, and
3 abuse.” While APAAC does not oppose this added provision, the arguable
4 enhancement to existing victims’ rights could conflict with other constitutional
5 rights of a defendant in some circumstances. For example, Ariz. Const. art. 2, § 24
6 gives a defendant the right to a “speedy *public* trial by an impartial jury.” As outlined
7 below (sec. B.4), Division One has held that the VBR may yield to a defendant’s
8 due process rights under the federal and state constitutions. *State ex rel. Romley v.*
9 *Superior Court (Roper)*, 172 Ariz. 232, 240, 836 P.2d 445, 453 (App. 1992).

12 **4. Rule 15.1 (The state’s disclosures.)**

13 Rule 15.1(e)(1)(B) requires the State, upon a defense written request, to make
14 911 calls available to the defendant for examination, testing, and reproduction. The
15 petition imposes a new limitation on the State’s obligation as follows: “*In the case*
16 *of 911 calls from a victim, before permitting access or testing of such tapes, the court*
17 *must first consider the victim’s rights to be treated with fairness, respect, and*
18 *dignity, and to be free from intimidation, harassment, and abuse.*” By writing this
19 new requirement into the rule, the petitioner is requiring the court to involve itself
20 in the disclosure process where no involvement existed before. This could greatly
21 impact the flow of discovery between the parties by requiring court hearings and
22 determinations on 911 calls from victims before disclosure could occur. It could
23
24
25

1 unduly hamper prosecutors' ability to promptly disclose such tapes no later than 30
2 days after receiving the defendant's request, as required by the current rule. And
3 failure to promptly disclose exculpatory 911 calls could potentially violate the
4 State's *Brady* and Rule 15.1(b)(8) disclosure obligations.

6 Additionally, Rule 15.1(g)(1) allows a court, on a defendant's motion, to order
7 any person to make available material or information if the court finds substantial
8 need and undue hardship to gain that information by other means. The petition
9 proposes limiting this disclosure provision to any person "*other than the victim.*"
11 Clearly, Ariz. Const. art. 2, § 2.1.(A).5 gives a victim the right to refuse a "discovery
12 request by the defendant[.]" However, in *State ex rel. Romley v. Superior Court*
13 (*Roper*), 172 Ariz. 232, 836 P.2d 445 (App. 1992), the court ruled that while the
14 VBR allows a victim to refuse a discovery request by the defendant, the VBR "must
15 yield to the federal and state constitutions' mandates of due process of law" in order
16 for a defendant to have a fair trial and present an adequate theory of the case. 172
17 Ariz. at 240, 836 P.2d at 453. There, the matter was remanded for an *in camera*
18 review of the victim's medical records. While *Roper* was fact-specific to the
19 defendant's justification defense, it illustrates that a due process right to a
20 fundamentally fair trial may outweigh a victim's right to refuse a discovery request.
21 (See also, *State ex rel. Romley v. Dairman*, 208 Ariz. 484, 490, ¶¶ 22-23, 95 P.3d
22 548, 554 (App. 2004) (independent constitutional interests of the defendant and
23
24
25

1 victim require the court to exercise its discretion in protecting each of the competing
2 interests)). APAAC recommends the petitioner consider modifying its proposal to
3 say “*other than the victim absent a determination by the court that the evidence*
4 *would be exculpatory.*”
5

6 Finally, Rule 15.1(i)(3)(A)(i) requires the state in a capital case, no later than
7 30 days after filing notice to seek the death penalty, to disclose the name and address
8 of each person intended to be called at the aggravation hearing. Similarly, Rule
9 15.1(i)(4)(A) and (B) require the prosecutor in a capital case, no later than 60 days
10 after receiving the defendant’s disclosure under Rule 15.2(h)(l), to disclose the name
11 and address of each person intended to be called as an aggravation phase rebuttal
12 witness or penalty phase witness. The petition proposes adding to each of these rules
13 “*except that a victim’s address or other locating information need not be disclosed.*”
14

15 APAAC notes that current Rule 39(b)(11)(A) contains an exception to the
16 prohibition on disclosing identifying and locating information not integrated into the
17 proposed rule change. That exception provides that a “court may order disclosure
18 of the victim’s identifying and locating information as necessary to protect the
19 defendant’s constitutional rights.” There are additional provisions in that exception
20 as to further dissemination of the information.
21
22
23

24 **5. Rules 16.3 (Pretrial conference.)**

25 Rule 16.3(d) allows the court at a pretrial conference to hear motions, set

1 evidentiary hearings and other pretrial conferences, obtain stipulations on facts, and
2 determine other matters affecting the trial, such as time limits, juror notebooks and
3 managing exhibits. The petition proposes a limitation on this rule that the court may
4 only address any of those matters "*after considering the views of the victim.*" A.R.S.
5 § 13-4435.F requires the court, before ruling on a motion for a continuance, to
6 consider the victim's views and rights to a speedy trial. APAAC recommends that
7 the proposed changes to Rule 16.3 be clarified to apply only to continuances
8 considered at the pretrial conference, as outlined in A.R.S. § 13-4435.F.
9

11 **6. Rules 16.4 (Dismissal of prosecution.)**

12 Rule 16.4(a) allows the State to move for a dismissal of a prosecution for good
13 cause, which the court may grant if dismissal is not to avoid Rule 8 time limits. The
14 petition proposes adding a requirement to the rule that the court may only order the
15 dismissal "*after considering the views of the victim.*" This proposal inserts the court
16 into the State's decision to dismiss a prosecution, which is not something that
17 currently exists either in the VBR or VRJA statutes. A fair reading of the proposed
18 rule change language could give a victim the right to object to a dismissal. Certainly,
19 a victim has the right to confer with the prosecution about a dismissal (A.R.S. § 13-
20 4419.A), but that right does not extend to the court denying a dismissal if the victim
21 objects. A prosecuting attorney must be free to decide which cases to pursue or not,
22 and the caselaw is clear that a prosecutor has broad discretion to prosecute cases
23
24
25

1 “regardless of the wishes of the victim.” *State v. Granados*, 172 Ariz. 405, 408, 837
2 P.2d 1140, 1143 (App. 1991). Under the VRIA, a victim has no authority to direct
3 the prosecution of a case. A.R.S. § 13-4419.C. APAAC recommends that if the
4 proposed revision is to be adopted, it should be amended to state “*after determining*
5 *that the victim has conferred with the prosecutor.*”
6

7 In addition, Rule 16.4(d) states that dismissal of a prosecution is generally
8 without prejudice unless the interests of justice require dismissal to be with
9 prejudice. The petition proposes adding a requirement that dismissal can be with
10 prejudice “*only after considering the rights of the victim to justice and due process.*”
11 APAAC cautions that whether to dismiss a case with or without prejudice is a purely
12 legal determination by the court which must weigh all the factors that bear on that
13 issue. *State v. Garcia*, 170 Ariz. 245, 248, 823 P.2d 693, 696 (App. 1991). Any
14 consideration of the interests of justice by the court should inherently include the
15 victim’s right to due process and justice.
16
17
18

19 **C. Repeal of Rule 39**

20 For nearly thirty years, Rule 39 has been often cited and commonly
21 understood by courts and practitioners as a primary source for victims’ rights. When
22 it was promulgated, the Comment to the new rule provided:
23

24 The purpose of the entire proceeding initiated by this Court was to
25 ascertain and ameliorate, if possible, the problems encountered by
victims. Consequently, in an attempt to steer a straight course toward

1 that objective, the Court has adopted a rule that deals explicitly,
2 precisely, and, we hope, comprehensively with victims' rights and the
3 concerns conveyed in the written and oral comments submitted to this
Court.

4 Ariz. R. Crim. P. 39 cmt (1989). APAAC cautions that by repealing Rule 39 in its
5 entirety, a long-standing and stalwart source for victims' rights could be lost and
6 those enumerated rights somehow diminished. However, as stated above, in
7 recommending the repeal of Rule 39 Victims' Rights, the petition, in effect, has
8 removed redundancies existing among the VRB, VRIA and Rule 39. In reviewing
9 the petition, APAAC notes that were the Supreme Court to adopt the petition's
10 proposal, there are some provisions of current Rule 39 that have not been integrated
11 into the proposed rule changes.
12
13

14 **1. Rule 39(b)(6)(A)**

15
16 Current Rule 39(b)(6)(A) gives a victim the right to confer with the State
17 regarding any decision about the preconviction release of the defendant. This
18 provision does not appear to be contained in the petitioner's proposed changes in
19 Rules 7.2 - 7.5. While both Ariz. Const. art. 2, § 2.1.6 and A.R.S. § 13-4419(A) give
20 the victim a right to confer with the prosecution about the disposition of a case, and
21 A.R.S. § 13-4422 gives a victim the right to be heard at any post-arrest release
22 determination, those provisions are silent on conferring with the prosecuting
23 attorney about preconviction release.
24
25

1 **2. Rule 39(b)(8)**

2 Current Rule 39(b)(8) gives a victim the right to be accompanied at an
3 interview, deposition or proceeding by a parent or another relative or support person
4 including an advocate. This provision is not contained in the petitioner's proposed
5 changes. The right does not appear separately either in the VBR or VRJA statutes.
6

7 **3. Rule 39(b)(11)**

8 Current Rule 39(b)(11) gives a victim the right, with noted exception, to
9 require the prosecutor to withhold the victim's identifying and locating information
10 during discovery and other proceedings. The exception, and accompanying
11 conditions, apply when a court orders such disclosure "as necessary to protect the
12 defendant's constitutional rights." Rule 39(b)(11)(A). This exception is not
13 contained in the petitioner's proposed changes and does not otherwise exist in the
14 VBR or VRJA statutes.
15

16 **4. Rule 39(d)(1)**

17 Current Rule 39(d)(1) provides that a victim has the right to the prosecutor's
18 assistance in asserting rights as provided by law. This right is not contained in the
19 petitioner's proposed changes and does not otherwise exist in the VBR or VRJA
20 statutes. Although A.R.S. § 13-4437.C allows the prosecutor to "assert" any right
21 to which the victim is entitled, that is different from assisting the victim (e.g. aide in
22 ...
23
24
25

1 submitting a victim impact statement, preparing restitution information, speaking in
2 court).

3 4 **5. Rule 39(d)(3)**

5 Current Rule 39(d)(3) provides direction to the prosecutor when a conflict
6 arises between the prosecutor and victim in asserting the victim's rights. This
7 provision is not contained in the petitioner's proposed changes and does not
8 otherwise exist in the VBR or VRIA statutes.
9

10 **6. Rule 39(e)**

11 Current Rule 39(e) provides for how a victim desiring to claim the notification
12 rights and privileges in the rule may claim them. This provision is not rewritten into
13 the proposed criminal rule changes. Although A.R.S. § 13-4417.A does provide that
14 a victim must request notice on an agency form, there is no corresponding provision
15 in the proposed criminal rule changes that clearly applies that provision to the
16 criminal rules.
17
18

19 **7. Rule 39(f)**

20 Current Rule 39(f) provides that a victim may waive their rights and privileges
21 enumerated in the rule and that the prosecutor or court may consider a victim's
22 failure to provide current address and telephone number "to be a waiver of
23 notification rights under this rule." A.R.S. § 13-4417.A states that if a victim fails
24 to keep their telephone number and address current "the victim's request for notice
25

1 is withdrawn.” While subtle, there is a difference between the two provisions, and
2 allowing the prosecutor to declare a waiver in order to proceed on a case is a
3 beneficial preference.
4

5 **8. Rule 39(g)**

6 Current Rule 39(g) provides for court enforcement of victim notice
7 requirements. Its various subparts, (1), (2) and (3), require the court to inquire if the
8 victim has requested notice and been notified and, if so, whether the victim is present
9 at a proceeding and wishes to be addressed. If the victim has requested notice but
10 has not been notified, the court generally may not proceed. The inquiry provisions
11 of Rule 39(g) are not contained in the petitioner’s proposed changes. A.R.S. § 13-
12 4423.B does require the prosecuting attorney, at a plea hearing, to advise the court
13 of any conference with the victim on the negotiated plea and reasonable efforts to
14 notify the victim of the plea proceeding, but no specific obligation is imposed on the
15 court regarding any inquiry at other court proceedings.
16
17
18

19 **III. CONCLUSION**

20 The Arizona Prosecuting Attorneys’ Advisory Council recognizes and
21 commends the Arizona Voice for Crime Victims on its goal of providing victims a
22 more meaningful participation in the criminal justice process by integrating victims’
23 rights throughout the various Arizona Rules of Criminal Procedure. The suggestions
24
25

1 and observations in this Comment are intended to strengthen the proposed changes
2 as set forth in the petition.

3
4 RESPECTFULLY SUBMITTED this 17th day of May, 2018.

5
6 

Elizabeth Ortiz, #012838
Executive Director
Arizona Prosecuting Attorneys'
Advisory Council

9 Electronic copy filed with the
10 Clerk of the Arizona Supreme Court
11 this 17th day of May, 2018.

12 By: 
13